

The Identification and Division of Intangible Community Property: Slicing the Invisible Pie

I. INTRODUCTION

In the California Civil Code, community property is defined by reference to its source and time of acquisition. In general terms, it consists of all property acquired during marriage by either spouse, other than by gift or inheritance.¹ With the single exception of personal injury damages,² specific types of property are not dealt with individually. When the community property is to be divided upon the dissolution of a marriage, the decision as to the types of assets that qualify for inclusion in this category must be made on the basis of very general statutory guidelines.

This treatment is quite satisfactory for most types of property. Real property and most tangible personal property can usually be readily identified, and their ownership and time of acquisition are generally certain. Common problems such as loss of records of commingling of community and separate assets would not be solved by definitional clarification. In the area of intangible personal property, and of certain assets, such as professional licenses, that do not easily fit into the category of property, the present guidelines are of little help. Most often, such assets have simply been excluded from consideration by the courts. Even where the courts have recognized an asset and added judicial interpretation to the statutory framework, the result has often remained unsatisfactory.

For the sake of simplicity, these problem assets will be referred to collectively as intangible personal property. As to some of them the problem arises out of the difficulty involved in determining their present value. As to others, there is also the more fundamental question of whether the asset is property at all, so that it should be divided between the spouses. In some cases, the time of the asset's acquisition is debatable.

There are several reasons why more questions are now being raised concerning the division of these assets than had been in the past.

¹CAL. CIV. CODE § § 687, 5100 *et seq.* (West 1970).

²CAL. CIV. CODE § 4800 (West 1970).

First, Civil Code Section 4800 was amended in 1970 to require that all community property be evenly divided between the spouses upon marriage dissolution. Before this amendment, much judicial discretion entered into the property division. This made it possible for courts to avoid in most cases the necessity of making an exhaustive list of the assets of the community and of their worth. Since a precise division could not be demanded by the party who would have urged inclusion of a debatable asset, extensive litigation over such an inclusion did not usually appear worthwhile.

Since the change in Section 4800, a failure to divide all community property, and to divide it evenly, is reversible error.³ The spouse seeking to have an asset divided now has a substantially greater incentive to fight for its inclusion. This is likely to have two effects on the treatment of intangible property. First, more of it will be included in property settlements because of the greater likelihood of its becoming an issue in a court battle. Secondly, as such issues are raised at trial more often, more appellate decisions concerning them will be rendered, and judicial thinking concerning these assets will become more precise.

Simultaneously with the change in Section 4800 came a second new influence, the beginning of a potentially profound change in the status and thinking of women. The Equal Rights Movement is bringing about serious questioning of a system through which the husband can acquire great earning potential and social prestige while the wife who is raising the children and keeping house becomes unemployable. Often, in the case of a divorce, there is little tangible property to be divided, so that the wife will be left with few assets, while the husband continues to possess considerable economic power. As more women refuse to consider this an equitable distribution of the assets which both worked to acquire, more litigation over the intangible assets now automatically remaining with the husband is likely to result.

A third factor that may exert an influence in this area is a background of successful malpractice actions against attorneys brought by spouses whose property rights were prejudiced through negligent omission of an asset that should have been divided as community property.⁴ If there is a possibility that an attorney will be liable for failure to seek to secure half of an item of intangible personal prop-

³*In re Marriage of Elkins*, 28 Cal. App. 3d 899, 903, 105 Cal. Rptr. 59, 62 (1972). See also *Brown v. Brown*, 27 Cal. App. 2d 188, 103 Cal. Rptr. 510 (1972), where the trial court's findings were reversed for failure to divide the husband's military retirement pay, which was the only community property.

⁴See, e.g., *Ismael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). For discussion of what constitutes attorney malpractice in general, see *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971).

erty for his client, he is likely to exercise particular diligence in seeing that such items will be identified and discussed. In a recent case, the Supreme Court of Texas expressed its concern in this precise area in an appeal to the bar and bench:

In the future, counsel for litigants in divorce suits should call to the attention of the trial judge all of the assets of the marriage . . . [T]he trial judges of the state, sitting in divorce suits, should inquire as to the existence of insurance or retirement programs to the end that the final judgment fully disposes of all property valuables of the community.⁵

In the many cases where all property is divided out of court, an even greater responsibility lies upon counsel to be sure that all the assets of the community are considered.

A detailed look at three specific types of intangible property will highlight some of the problems that can confront the attorneys of both parties as an equitable division of the community assets is sought.

II. THE TRADITIONAL PROBLEM: PENSION RIGHTS

Before 1970, only two types of intangible community property were dealt with to any large extent: life insurance and pension rights. The law as to each of them has become relatively fixed and has been the source of repeated discussion in legal publications.⁶ In these cases, particularly ones involving pensions, a number of specific phrases were used again and again, and came to represent a set of judicial rules for the treatment of intangible property. It was said that to be a divisible property right, a right had to be "vested" and "unconditional," and could not be a "mere expectancy."⁷

In the landmark case of *French v. French*,⁸ the divorcing wife claimed that her husband's Navy retirement pay was community property because it was payment for services rendered during the marriage. The court agreed with the general theory, and the dictum to that effect is cited as precedent in most subsequent retirement pay cases. However, the husband in *French* was obligated to serve 14 more years in the Navy Reserve before he would be able to claim the

⁵Busby v. Busby, 457 S.W.2d 551, 555 (Tex., 1965).

⁶See, e.g., Kent, *Pension Funds and Problems under California Community Property Laws*, 2 STAN. L. REV. 447 (1950); Note, *Community Property — Deferred Compensation Plans — Interest of Nonemployee Spouse at Divorce*, 19 SW. L.J. 370 (1965); Scoville, *Community Property Rights in Life Insurance — Some Oft-Heard Half-Truths*, 108 TRUSTS & ESTATES 1164 (1969); Note, *The Community Life Insurance Policy*, 18 BAYLOR L. REV. 627 (1966). Since the community property aspects of life insurance are neither unusual nor unsettled, they will not be specifically discussed.

⁷In re Marriage of Karlin, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972) and cases there cited.

⁸17 Cal. 2d 775, 112 P.2d 235; 134 A.L.R. 366 (1941).

benefits in question. Because of this, the court held that "[a]t the present time, his right to retirement pay is an expectancy which is not subject to division as community property."⁹

Later cases developed the holding in *French* into the vested-unvested distinction.¹⁰ A pension right is considered to have vested if the employee would receive payments if he retired at the present time. If he would receive larger payments upon a later retirement than upon a present retirement, then only the amount that would presently be received is taken into consideration.¹¹ If the system is such that the employee is at all times entitled to withdraw his accumulated contributions, but he will get substantially more than the value of the contributions if he continues to work for a minimum number of years, then the accumulated sum will always be community property, while the value of the actual pension payments does not become so until the right to receive them has vested.¹²

Until recently, it would have appeared that the pension rights precedents required an unconditional vesting of the right to receive compensation, both as to the fact of receipt and as to the amount to be paid. Two 1972 cases, however, appear to point toward a change in judicial attitude.

The first case, *Waite v. Waite*,¹³ was decided by the Supreme Court of California. The central issue was the provision in the Judges' Retirement Law¹⁴ to the effect that a judge's pension will be reduced by any amount he receives as salary for temporary service. Since any such services would be performed after the divorce, the compensation for them would of course not be community property. Therefore, such amounts could not be included in a present calculation of the actuarial value of community property pension benefits. This results in an inability on the part of the court to fix a definite monetary value upon the pension payments to be received by the judge once he retired.

The husband's argument in this case was that due to the feature pointed out, the retirement benefit was not unconditional and should thus not be divisible under the traditional rule. The court decided that while the general rule is correct, it does not extend to conditions entirely within the control of the employee.¹⁵ In spite of

⁹17 Cal. 2d at 778, 112 P.2d at 237; 134 A.L.R. at 368.

¹⁰*Williamson v. Williamson*, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962); *Benson v. Los Angeles*, 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P.2d 649 (1963); *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 89 Cal. Rptr. 61, 473 P.2d 765 (1970).

¹¹*In re Marriage of Karlin*, 24 Cal. App. 3d 29, 101 Cal. Rptr. 242 (1972).

¹²*Phillipson v. Board of Administration*, 3 Cal. 3d 32, 41, n.8, 89 Cal. Rptr. 61, 66, 473 P.2d 705, 770.

¹³6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P.2d 13 (1972).

¹⁴CAL. GOV'T CODE § 68543.5 (West Supp. 1972).

¹⁵*Waite v. Waite*, 6 Cal. 3d 461, 472, 99 Cal. Rptr. 325, 332, 492 P.2d 13, 20.

the court's disclaimer that any change from prior law was intended, the rule that a contingency within the control of the employee is not one that removes the asset from consideration is one that had never previously been enunciated.

This new doctrine was immediately seized upon in a case decided in the 3rd Appellate District. In *Bensing v. Bensing*,¹⁶ the husband was a major in the Air Force with 28 years of service completed. He argued that since he had not yet retired, his retirement benefits were contingent upon his successful retirement, which could be prevented by death or court martial. Thus he claimed the benefits "do not vest until retirement."¹⁷

The court, basing its holding upon *Waite*, rejected Major Bensing's argument on the grounds that whether and when he retired was "a condition entirely within [his] control," and that "he only needed to apply for the pension benefits to receive them."¹⁸ The opinion does not mention the possibility, which must have been raised by counsel, that a court martial could deprive an officer of all retirement benefits. Such a contingency could be considered to be subject to his control, but not in the same direct way as part time employment would be.

This decision appears to go further than *Waite* in retreating from a strict vested-unvested distinction. The court enunciates as one reason for its decision the possibility that, in the absence of such a rule, the husband could have purposely postponed his retirement just long enough to deprive his wife of any share of the benefits earned over a period of 28 years, during 23 of which he was married to her.¹⁹ This is an indication that the court is interested not as much in abstract categories as in the practical consideration that a rule should not be structured so as to allow one party to determine through unilateral action that a major asset will not be divisible community property.

The one theme that appears to tie the recent cases on all types of intangible property together is this concern that neither of the parties should be able to acquire an unfair share of the available assets through careful planning. The new emphasis upon an equal division of all community property is very likely to have been a substantial factor in bringing about the articulation of this concern, and should continue to cause attention to be directed toward preven-

¹⁶25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972). See also *Brown v. Brown*, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (1972) *in accord*. It should be noted that the argument has been made that the *Bensing* line of cases is contrary to the Supremacy Clause of the U.S. Constitution, and will eventually be invalidated by the federal courts, an argument with which this author does not agree. See Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. STATE B.J., No. 1, p. 12, Jan. 1973.

¹⁷25 Cal. App. 3d at 892, 102 Cal. Rptr. at 256.

¹⁸25 Cal. App. 3d at 893, 102 Cal. Rptr. at 257.

¹⁹*Id.*

tion of this type of inequity.

In spite of this subtle change in the definition of "vested," however, the underlying dichotomy is as arbitrary as ever. If, as is true in the military, 20 years of employment are required before the employee will receive any retirement pay, then a divorce in the 19th year will effectively cut off the rights of the spouse, even though 95% of the work for which the pension is intended to compensate was performed during the marriage. This may be compared with the situation where the marriage takes place in the 10th year of employment and the divorce in the 21st year, when the pension right has already vested. In that case, since $1/2$ of the right was earned during marriage, that half is community property, and the spouse will get either $1/4$ of each pension payment or, if the funds are presently available, $1/4$ of the actuarial value of the pension right.²⁰ If the goal is to divide evenly all property earned or acquired during marriage, no matter when received, the result of the vested-unvested distinction is clearly unsound. Where an employee has had a secure job for many years during marriage, and has accumulated a substantial portion of the employment time necessary for the vesting of benefits, he or she has earned an identifiable portion of an amount no more difficult to calculate now than it will be after the right has vested.

There are three ways in which a court could divide pension rights if the vested-unvested distinction were to be abandoned. The method requiring the least future supervision, and thus presently the most favored by the courts in cases where vested benefits are at issue, would give the employee all rights in the pension fund, and the spouse an amount of other property equal to the present actuarial value of the fund, the rest of the property to be divided equally. This is the least desirable alternative, since the actuarial assumptions are rarely matched by the actual events. Further, there often is no other property that can be given to the non-employee spouse in lieu of an interest in the pension. If there is, an allocation of all liquid assets to one spouse may be very burdensome for the other. The second alternative would be to calculate the percentage of each retirement payment that will be community property, and to make a present award of that portion of each payment to the non-employee spouse, to be paid if and when the payments are received by the employee. This is the method presently used in cases where there is no other divisible property. This method is the more desirable the closer the employee is to actual retirement.

²⁰Although a division as the payments become due seems much more equitable than a division based upon actuarial assumptions, it must be noted that in the case where the non-employee spouse predeceases the employee spouse, an unequal division will also result. It has been repeatedly held that no further payments need then be made to the deceased spouse's estate. See, e.g., *Waite v. Waite*, 6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P.2d 13.

There is a third alternative that has never been used by the courts, because community property is traditionally divided at the time of divorce. This is the possibility of continuing jurisdiction until the actual retirement of the employee, at which time an equitable adjustment can be made. This method has the advantage of flexibility. If the employee has been paying spousal support in the interim, for example, those payments could be considered in reduction of the community obligation. It would seem that where there are few assets, this alternative would be attractive to both parties. It should be noted, however, that it does depend upon the parties' continued presence in the jurisdiction.

Once the vested-unvested barrier is broken (judicially or legislatively), a problem of line drawing also has to be solved. Any right less than half earned should undoubtedly not be considered. But after that, what is the best place at which to begin to recognize the spouse's interest? There is no simple answer, but the inequity of allowing the non-employee spouse no share of a benefit that is very likely to vest in a year or two should not be allowed to continue.

One can readily understand the reluctance of the courts to permit the inclusion in community property of assets that would require for their division continued jurisdiction and possible future settlement of property rights. However, the result of the failure to divide an unvested pension as community property will often be the inability of the other spouse to support him- or herself, so that payment of spousal support over an extended period of time would be necessary. This support would be paid out of the same funds, and it is very likely that continued court involvement will be necessary in any case.²¹ Thus the vested-unvested distinction remains one of the most unsatisfactory aspects of the present judicial treatment of intangible property, and one that is likely to continue to be attacked vigorously.

III. THE RICE UNITS CASES

The right to receive retirement benefits, whether or not it has vested, is not difficult to fit within the definition of property. Conceptually, the accumulation of such benefits is little different from the setting aside of money for future use on a voluntary basis. There are many valuable rights, however, that are not as easily classified as

²¹In *Williamson v. Williamson*, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962), the court found the unvested pension rights not to be community property and went on to say:

Defendant remains subject to the further order of the court, both for child support and for alimony. If, while these obligations for support continue, this pension right can be converted into spendable cash, the court will have opportunity to make an appropriate modification. *Id.* at 12, 21 Cal. Rptr. at 167.

property rights. Typical of some of the difficulties that may be encountered are some of the characteristics of perhaps the most unusual item of intangible property to have been discussed by the courts: the right to grow rice under the federal quota system. There have been two cases on this subject, *Miguez v. Miguez*²² in Texas, and an unreported California appellate case, *Bell v. Felix*.²³ In both cases, these rights were found to be community property.

In order to stabilize prices in the rice market, the federal government operates a quota system under which only those who have grown rice in the past or acquired rice acreage rights from a former grower are allowed to engage in rice farming. Each year the total acreage to be farmed is distributed among the eligible growers in proportion to the number of acres each had farmed the previous year. The right to grow rice on one acre is known as a "rice unit." The original distribution dates back to 1956. Since the granting of units to a grower in any given year is dependent completely upon the rice grown by him or his antecedent the preceding year, in combination with the total number of units found to be needed by the federal government, the "possession" at any time of a given number of rice units is a type of property right that is very difficult to define.²⁴

In both of the cases mentioned, the husband held a number of rice units at the time of the divorce, and the wife claimed that since these were acquired through work performed during the marriage (the growing of rice since before 1956), they were community property. Since rice units are salable independent of the land to which they related originally, they have a definite market value.²⁵ However, if a grower were to stop growing rice for a year, or to grow only part of his allotment, he would immediately lose all or part of his units without compensation. The argument was thus made that the units were not property in a sufficiently concrete sense to be divisible as community property.

In *Miguez*, this argument was rejected due to a concern very similar to that in *Bensing*. The court expressed the fear that types of property would be allowed to exist which could be purchased with community property funds, held immune from division during a divorce and then sold once the funds were safe from the former spouse's claims. The implication of the opinion was that any assets in which community funds were invested and upon which a present

²²453 S.W. 2d 514 (Tex. Civ. App., 1970).

²³3 Civil No. 13,075, Cal. Ct. of Appeal, 3d App. Dist., Aug. 15, 1972.

²⁴A more detailed explanation of the nature of rice units, and cites to the federal statutes involved, may be found in both opinions, and in the briefs of the parties in *Bell v. Felix*, 3 Civil No. 13,075, Cal. Ct. of Appeal, 3d App. Dist., Aug. 15, 1972.

²⁵In 1969, some of the units involved in *Bell v. Felix* were sold for \$325 apiece.

value could be placed should be considered to be community property, and divisible upon divorce. As *Bensing* stands for the proposition that an employee should not be able to control whether his or her spouse was to share in retirement pay earned during marriage, so the rice units cases indicate that one spouse should not be able to invest in what might be called community property shelters — a form of wealth immune from division upon divorce.

The rice unit is a particularly interesting type of intangible property for several reasons. The tenuous year-to-year nature of its ownership, as described above, is only one of them. A further problem is that it may be very difficult to say whether or not the units held by someone were acquired during the marriage. In both of the cases cited, the parties had been married before the establishment of the most recent quota. But if a person holds units by virtue of having grown rice since before 1956, marries in 1960, and wishes to dissolve the marriage in 1972, the question becomes whether the units held now should be considered to be the same ones that were held as separate property at the time of the marriage or ones newly acquired by virtue of continued rice production during marriage. This question has yet to be put before the courts.²⁶

Another point that lends particular interest to the rice units cases is the way in which they highlight the valuation problem that would present itself if the units were not readily salable. They have an established market value based upon their income producing potential. If they could not be sold, however, would this same income producing potential to their holder be considered "property?" And if it is property, what is its present value?

It was easy for the courts, in the rice units cases, to find the presence of a divisible property right. An asset that can be bought and sold, no matter how many other difficulties it may present, is a separable unit of present wealth. Much more difficult is the case of an asset personal to its holder — an income producing property right just as valuable as the right to grow rice, but not transferable. Professional licenses are the most clear-cut such rights, but one might also consider tenure, union seniority, judicial appointment for life, or even election for a term of years. All of these are rights for which a present value in terms of added income potential could be established actuarially. The cases which follow have come close to considering an approach to be taken toward claims aimed at such personal rights.

²⁶Since the units have been treated as if they had a continuing existence when their status is determined to be community property, they should also be so treated when they were originally separate property. However, this consistency cannot be expected as a matter of course.

IV. PARTNERS AND PROFESSIONALS

Where one spouse is a member of a partnership or a holder of a professional license, he has access to income producing potential similar to that which the holder of rice units enjoys. But while the monetary value of the rice units, or the units themselves, can be divided between the divorcing parties, these assets must remain with one spouse. Further, the total present value of a professional practice or partnership is extremely difficult to ascertain. Part of the reason for this is the difficulty of allocating the value of future earning ability to a specific period in time at which it can be said to be a present asset rather than a mere speculation.

The early position of the California courts in cases involving professional partnerships was that only assets that had been distributed to the partner could be taken into consideration when the property was divided between divorcing spouses. As was enunciated in *Hill v. Hill*, the undivided assets were considered a "[m]ere expectancy . . . not subject to division as community property."²⁷ The reasoning put forth was that since the partner had no enforceable present interest in the partnership assets in the absence of an accounting, his or her spouse could have no claim to them.²⁸ In *Hill*, it was held that the trial court correctly disallowed questions seeking to ascertain whether the husband's law partnership held monies that would be distributable to him.²⁹ This raises the possibility that a spouse who is a member of a small and friendly partnership could hide a substantial amount of earnings while contemplating divorce through use of this particular "shelter."

These precedents were relied upon by the husband in *Carmichael v. Carmichael*,³⁰ a case involving his partnership in a cattle ranch. The trial court held the husband's share to be community property, and allocated \$125,000 to the wife in lieu of her half of the husband's partnership interest. The Court of Appeal agreed, and specifically rejected the reasoning of *Hill* and *Speer*: "But an interest in a partnership is not a mere expectancy. It is personal property. It is a present interest."³¹ There have been no subsequent reported cases applying or rejecting this holding in relation to a professional partnership. The difficulties are clear. The net worth of a cattle ranch is relatively easy to determine, since it is based on tangible assets. But

²⁷82 Cal. App. 2d 682, 701, 187 P.2d 28, 39 (1947). See also *Speer v. Speer*, 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962).

²⁸This argument clearly ignores the fact that the partner does have an enforceable future right. No one would argue that a future interest in real estate, for example, is of no value because it is a "mere expectancy."

²⁹82 Cal. App. 2d at 700, 187 P.2d at 38.

³⁰216 Cal. App. 2d 674, 31 Cal. Rptr. 514 (1963).

³¹216 Cal. App. 2d at 682, 31 Cal. Rptr. at 519.

how is a partner's interest in a law, medical, or accounting partnership to be valued?

A partial answer is found in a line of cases involving individual professional practices. In *Mueller v. Mueller*,³² the husband owned and operated a successful dental laboratory with a large established clientele. The entire business was built up during marriage and was thus clearly community property, the only problem being the valuation of its assets. The husband argued that any value above that of the physical assets was personal to himself, and not divisible. The court disagreed, and allowed the sum of \$25,000, the value placed upon the business' goodwill, to be included in the community property to be divided.

In *Golden v. Golden*,³³ the value of the goodwill of the husband's medical practice was similarly held to be divisible. Also in agreement are *Brawman v. Brawman*³⁴ and *Fritschi v. Teed*,³⁵ but neither of these cases specifies that the intangible value of the professional practice is to be characterized specifically as its "goodwill." In *Brawman*, the division is likened to that which occurs when a silent partner withdraws from a partnership.³⁶ In *Fritschi*, the court speaks of the "existing economic potential"³⁷ of the professional practice which is to be divided. The latter expression raises a question that is left unanswered by all of the cases so far decided: To what extent is the future earning capacity of the spouse a present asset that should be included in the community property?

The answer to this question is relatively simple in the case of a rice unit, since its market price represents the rice growing community's judgment of the future earning power inherent in unit ownership. The present value and the future earning power are inseparable. But a license to practice law, medicine, or accounting is not salable. Even where an established practice could be sold to another licensee, the value of the goodwill is highly speculative. One of the goals of any system of division of community property should be to insure the equal treatment of all types of property. On the one hand, the intentional creation of community property "shelters" should not be possible. On the other hand, only that which is truly present wealth should be divided. It was never intended that the community property system should serve as a vehicle of access to a spouse's after-divorce earnings. Yet, if the acquisition of a license or degree can be shown to make a measurable difference to an individual's

³²144 Cal. App. 2d 245, 301 P.2d 90 (1956).

³³270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969).

³⁴199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (1962).

³⁵213 Cal. App. 2d 718, 29 Cal. Rptr. 114 (1963).

³⁶199 Cal. App. 2d at 887, 19 Cal. Rptr. at 110.

³⁷213 Cal. App. 2d at 726, 29 Cal. Rptr. at 119.

ability to amass wealth in the future, is it not a present asset?

An indication of the line being drawn in this area by the California courts is given in *Todd v. Todd*³⁸ where an expert testified at the trial that the value of the husband's legal education, which had been paid for out of the wife's earnings, was \$308,000 in increased earning power. The trial court made an express finding that the value of the claimed asset was "\$0.0." The Court of Appeal approved of this finding with the following words:

If a spouse's education preparing him for the practice of the law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community monies, it manifestly is of such a character that a monetary value for division with the other spouse cannot be placed upon it.³⁹

A legal or other professional education can be said to have a specific actuarial value because of the amount by which it increases earning power, but that value is as yet only an abstraction of a general trend. Future work will be necessary before any part of the expected increase in earnings can be realized. Even then, it will be impossible to accurately separate the part earned through training and licensure from the part earned through current efforts. But the greatest obstacle to present recognition as an asset is the fact that no amount at all will be realized in the absence of ongoing work effort. (This was not true in the case of the rice units).

Partly for this reason, the actuarial value of the increase in earning power cannot be sold or encumbered. A vested pension right, in the absence of legislative restriction, can be borrowed against; a rice unit can be sold; goodwill is at least theoretically salable and can in some cases be borrowed against. Each represents the rewards of past work in a form other than immediate liquid remuneration, but a liquid equivalent is at some time available. The asset that can be sold or encumbered is thus a present asset. It can properly be thought of as property. The asset from which no immediate monetary benefit can be derived is likely to be too dependent upon future performance for its present possession to be considered a true property right. The rice unit, like the earning power of the lawyer, simply disappears if the right it represents is not exercised. The difference between the two lies in the fact that the rice unit can be sold to someone willing to use it, so that its economic potential is realized in an alternative way.

The line drawn by the courts follows, perhaps unwittingly, this realization principle. An asset is only "property" if its owner could derive a monetary benefit from it even if he wished to make no further effort than to find a willing buyer or lender. It remains to be

³⁸272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

³⁹272 Cal. App. 2d at 791, 78 Cal. Rptr. at 134.

seen whether this approach represents the best way of reconciling the various competing equities.

V. CONCLUSION

As the *Todd* case in particular shows, imaginative approaches are being used by spouses who feel that the community property laws should enable one to derive some benefit from having been the marital partner of someone who acquired a significant economic advantage during that partnership. Mrs. Todd, after working to put her husband through law school, is justifiably upset by the theory that she should get no benefit from this investment. The wife of 19 years who is told that her husband's military retirement benefit has not vested can present a strong argument in favor of abolishment of the vested-unvested distinction. The husband whose wife is a tenured law professor can validly claim that her tenure is a present valuable right acquired during marriage. Can and should the community property laws be used as a vehicle for change in any or all of these instances?

The division of property is possible only to the extent that divisible property is available. As the cases discussed have shown, the California courts seem to be willing to go quite far in the direction of recognizing all possible assets, as long as those assets have some relationship to a present, ascertainable monetary value. The only area where this can not be said to be true is that of unvested retirement benefits. There, change should continue to be urged along the lines discussed above. But the problems presented by the hypotheticals above cannot be solved merely by delaying division until earnings are realized. The difference in earning capacity is never reduced to an identifiable figure. No sum will ever be received that will not be directly related to future work effort. If the item in question is in the nature of tenure or an appointment, moreover, not even the amount of effort and money spent specifically for its acquisition can be ascertained, so that the community nature of the asset may be uncertain.

Even in the situation such as that complained of by Mrs. Todd, however, where the asset in question was clearly acquired at the expense of community money and effort, it might be said that the inequity lies not in the absconding of her spouse with a community asset, but in the fact that the community funds were used to purchase something that would be personal to him. While his law degree would result in increased community earnings if he proceeded to put it to use, it cannot, by itself, ever be an asset of the community. The money spent on the legal education might be likened to money spent on the services of a heart surgeon which enable the employed spouse to continue working. There will be continued benefits to the spouse who received the service, and to the community if it remains intact,

but no meaningful division in the case of divorce is possible.

The community property laws were never intended to adjust what is essentially a regretted investment. Wives have traditionally invested a substantial amount of effort in providing housekeeping and child raising services for the community, without being able to use the community property system as a means of recovering any of this investment in the case of a divorce. One of the ways in which the Women's Rights Movement is fighting for recognition of the value of such services is to continue to demand that courts abandon their refusal to enforce contracts between spouses. Success at this endeavor could also be used to remedy the inequities left in this area. The spouse who wishes to be protected in case of a major investment of community funds in expenditures calculated to increase the other's earning ability could insist upon a contract guaranteeing one of several possible settlements, such as restitution of half the amount involved, if dissolution of the marriage ensues within a specified number of years. A provision for such restitution in specified cases could also be provided for through legislation. It cannot be expected to be instituted through the courts.

The recognition of intangible personal property can go a long way toward making the division of community property more equitable. Although the types of property recognized as divisible have been limited, the limitation (with the exception discussed) has been along an identifiable and reasonable line, that of the possibility of present monetary valuation. No asset that can credibly be included within this line should be ignored by counsel on either side of a dissolution case.

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